

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN P. HOLLAND and DEPARTMENT OF DEFENSE,
DEFENSE FINANCE & ACCOUNTING SERVICE, Columbus, OH

*Docket No. 02-1929; Submitted on the Record;
Issued June 3, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received overpayments in the amounts of \$2,017.52 and \$2,647.32; (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment of \$2,017.52, and therefore was not entitled to waiver of recovery; and (3) whether the Office properly denied waiver of recovery of the overpayment of \$2,647.32 under section 8129(a) of the Federal Employees' Compensation Act.¹

On May 13, 1997 appellant, then a 51-year-old discount prompt pay monitor, filed a notice of occupational disease (Form CA-2) alleging that she sustained carpal tunnel syndrome from using her personal computer in the performance of her duties. On August 22, 1997 appellant's claim was accepted for bilateral carpal tunnel syndrome. Surgery was authorized. On March 21, 1998 appellant had a right carpal tunnel release and on April 8, 1998 appellant had a left carpal tunnel release.

By letter dated April 24, 1998, appellant was informed that she would be paid compensation every 28 days based on 2/3 of her weekly pay rate of \$610.11. In order to avoid an overpayment, she was advised to notify the Office immediately if she returned to work.

By decision dated September 6, 2001, the Office reduced appellant's compensation to reflect that she was no longer totally disabled but rather was partially disabled and had the capacity to earn wages as a billing clerk at the rate of \$320.00 per week. On November 16, 2001 appellant received a schedule award based on a 5 percent permanent impairment to each upper extremity for a total award of 10 percent impairment.

On November 28, 2001 the Office issued two overpayment memoranda. In the first, the Office noted that an overpayment in the amount of \$2,647.32 occurred because the Office failed

¹ 5 U.S.C. § 8129(a); 5 U.S.C. §§ 8101-8193 (1974).

to commence deductions for appellant's correct choice of health benefits insurance (HBI) Code 101.² Instead, the Office took deductions for HBI Code AYI for the period January 3, 1999 through February 26, 2000 in the amount of \$571.22 and for HBI Code 104 for the period February 27, 2000 through July 17, 2001 in the amount of \$1,132.08. The Office noted that deductions should have commenced using HBI Code 101 for the entire period January 3, 1999 through July 14, 2001 for an amount of \$4,350.62. The Office then determined that when one subtracted the deductions made (\$571.22 plus \$1,132.08) from the amount that should have been collected (\$4,350.62) this resulted in an overpayment of \$2,647.32. The Office found that appellant was without fault in the creation of this overpayment.

In a separate memorandum of the same date, the Office found that an overpayment in the amount of \$2,017.52 occurred as the claimant received voluntary separation incentive pay, effective March 1, 2001, while she continued to receive compensation benefits from the Office for the period May 1 through June 3, 2001. The Office noted that, even though the Office missed the "cut off date" to stop compensation payments after appellant's voluntary retirement, appellant had been previously advised on April 24, 1998 of the conditions under which she was being paid compensation and to return any compensation checks received after she returned to work. The Office noted that appellant failed to return the check and was therefore at fault in the creation of the overpayment of \$2,017.52.

On December 27, 2001 appellant requested a telephone conference which was held on January 8, 2001. At that time, the Office advised appellant to forward financial information if she wanted to request a waiver of the overpayment.

On May 20, 2002 the Office issued two formal decisions finalizing the overpayment decisions.

The Board finds that appellant received an overpayment of compensation that arose when appellant concurrently received compensation for temporary total disability and separation pay.

It is well established that an injured employee must make an election between compensation for disability and retirement pay; the employee may not receive both.³ Section 8116(a) of the Act⁴ places the following limitations on the right to receive compensation:

"While an employee is receiving compensation under this subchapter, or if [s]he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have

² The record reflects a note from a telephone call which indicated, "Evelyn has verified that we should have been deducting for Code 101, effective January 3, 1999."

³ See *John Russell Miller*, 6 ECAB 544 (1954) (U.S. Navy retirement pay); *Marcel F. Hubert*, 6 ECAB 539 (1954) (Coast Guard retirement pay); *Mariquita Atcheson (George Atcheson, Jr.)*, 5 ECAB 570 (annuity under the Foreign Service Retirement System); *Ben D. Pate*, 4 ECAB 70 (1950) (annuity under the Civil Service Retirement Annuity Act of July 3, 1926); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000 (January 1997).

⁴ 5 U.S.C. § 8116(a).

continued, [s]he may not receive salary, pay, or remuneration of any type from the United States, except--

- (1) in return for services actually performed;
- (2) pension for service in the Army, Navy, or Air Force;
- (3) other benefits administered by the [Department of Veterans Affairs] unless such benefits are payable for the same injury or the same death; and
- (4) retired pay, retirement pay, retainer pay, or equivalent pay for service in the Armed Forces or other uniformed services, subject to the reduction of such pay in accordance with section 5532(b) of title 5, United States Code.

“However, eligibility for or receipt of benefits under Subchapter III of Chapter 83 of this title, or another retirement system for employees of the government, does not impair the right of the employee to compensation for scheduled disabilities specified by section 8107(c) of this title.”⁵

The Board addressed the issue of dual benefits based on separation pay in the case of *Willard S. Moger, Jr.*⁶ In that case, the employee elected to receive compensation for total disability beginning October 1, 1995. The record established that he also received separation pay as a “buyout” during the same period following his voluntary retirement. The Board found that appellant received an overpayment of compensation as a result of the dual receipt of separation pay or early retirement incentive pay and compensation for total disability. Similarly, in *Michael A. Grossman*, the Board found that, because appellant concurrently received a six-month lump-sum payment of base salary as a special retirement option and compensation for temporary total disability, he erroneously received a dual benefit.⁷ Because appellant concurrently received separation pay and compensation for temporary disability, the Board finds that she received dual benefits for which an election was required.

The Board finds that the case is not in posture for a decision on the amount of the overpayment of compensation as a result of appellant receiving dual benefits.

The record indicates that appellant’s election of voluntary separation incentive pay became effective May 1, 2001 and that appellant continued to receive compensation benefits from May 1 to June 3, 2001. The record reflects that appellant received a check for \$891.45 for the period May 20 to June 2, 2001. However, the record does not contain evidence indicating the amount appellant was paid for compensation from May 1 to May 19, 2001. Without an indication as to what appellant was paid for this period, the Board is unable to determine whether

⁵ 5 U.S.C. § 8116(a).

⁶ 51 ECAB 550 (2000).

⁷ 51 ECAB 673 (2000).

the Office accurately stated the amount of the overpayment.⁸ Accordingly, this case is remanded for the Office to provide evidence with regard to what appellant was paid for the period May 1 to May 19, 2001.

With respect to the waiver of the overpayment received as a result of the dual benefits, the Board finds that appellant was without fault in the creation of the overpayment.

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations⁹ provide in relevant part:

“OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have been known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect.”

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation check in question, she knew or should have known that the payment was incorrect.¹⁰

The Office noted that, by letter dated April 24, 1998, appellant was instructed to notify the Office immediately if she returned to work. The Office found that appellant was therefore on notice that she should have returned the compensation check that she received after her retirement. However, this letter did not specifically state that she could not receive compensation and her separation payment and, therefore, at the time appellant received her check, she could not have reasonably known that an overpayment occurred. Therefore, the

⁸ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(f) (September 1994) (the mathematics involved in the calculation of the overpayment must be documented in writing in the case file).

⁹ 20 C.F.R. § 10.433.

¹⁰ *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

Board finds that appellant was without fault in the creation of the overpayment. Accordingly, the Office's determination that appellant was at fault in the creation of the overpayment that occurred due to appellant receiving dual benefits is reversed. Therefore, on remand, the Office must further determine whether waiver is applicable in the case of the overpayment which occurred because appellant received dual benefits.

The Board further finds that the Office improperly determined that an overpayment occurred when improper deductions were made for appellant's health insurance.

The Office found that an overpayment in the amount of \$2,647.32 occurred because the Office failed to commence deductions for appellant's correct choice of HBI Code 101. Instead, the Office noted that it took deductions for HBI Code AYI for the period January 3, 1999 through February 26, 2000 and HBI Code 104 for the period February 27, 2000 through July 17, 2001. The Board notes that in appellant's claim for compensation (Form CA-7) filed on March 13, 1998, the employing establishment indicated that her health benefit provider was AYI. There is no evidence in the record indicating that appellant switched her health benefits other than a notation of a telephone call indicating that "Evelyn" said that the Office should have deducted pursuant to Code 101 effective January 3, 1999. This is insufficient to establish that deductions were made for the wrong health plan. Accordingly, the Office's finding that an overpayment in the amount of \$2,647.32 occurred because health benefits were improperly deducted is reversed. In light of the disposition of this issue, the issue of whether waiver was warranted in this matter is moot.

Accordingly, the May 20, 2002 decision finding that an overpayment occurred in the amount of \$2,017.52 is vacated, and this case is remanded for further consideration pursuant to this opinion. The May 20, 2002 decision finding that an overpayment occurred in the amount of \$2,647.32 is reversed.¹¹

Dated, Washington, DC
June 3, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹¹ The Board notes that appellant only appealed the decisions with regard to overpayment; accordingly, the Board has only addressed these decisions.